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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 770

ROBERT LYNN MARTIN, *Petitioner*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States District Court for the Southern District of Texas, Houston Division, convicting him of transmission of wagers and wagering information in violation of 18 U.S.C. § 1084.

OPINION BELOW

The district court did not issue an opinion; certiorari is sought here prior to judgment in the court of appeals.

JURISDICTION

Petitioner was adjudged guilty by the United States District Court for the Southern District of Texas, Houston Division, on May 26, 1966 (R. 176).[1] Motion in arrest of judgment was denied June 22, 1966 (R. 179). Notice of appeal was filed June 30, 1966 (R. 182), and the case was docketed in the United States Court of Appeals for the Fifth Circuit, September 19, 1966.

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. §§ 1254(1) and 2101(e) prior to judgment in the Court of Appeals for the Fifth Circuit because the sole point on which he has appealed turns upon a constitutional issue now before this Court in *United States* v. *Fabrizio*, No. 47, October Term, 1966.[2]

STATEMENT

Petitioner was convicted in the United States District Court for the Southern District of Texas, Houston Division, on May 26, 1966, of violating 18 U.S.C.

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[1] The citation "R." refers to the record in the United States Court of Appeals for the Fifth Circuit certified by the Clerk of that Court to the Supreme Court.

[2] STERN & GRESSMAN, SUPREME COURT PRACTICE 151 and n. 47 (3d ed. 1962) ("The Court has also reviewed cases before judgment below when a similar or identical question of constitutional or other importance was already before the Court in another case [citing authorities in footnote] . . . .")

The relationship between *Fabrizio* and the instant case is discussed throughout the section on "Reasons for Granting the Writ", *infra*. Since *Fabrizio* may be decided on grounds of statutory construction rather than of constitutional power (see n. 4, *infra*), the instant case may be a more appropriate one for consideration of the limitations imposed by the Tenth Amendment on federal anti-gambling legislation.

§ 1084 (R. 176). The charge against him was transmission of wagers and wagering information by telephone between Houston, Texas, and Las Vegas, Nevada (R. 1-5). In pre-trial motions, petitioner challenged the constitutionality of 18 U.S.C. § 1084 as applied to the circumstances of this case (R. 26-49). With the agreement of the trial court, a procedure was designed to preserve this sole point for appeal, while in effect pleading guilty to the facts charged. In open court Martin (and his co-defendant Dodson), having pleaded not guilty upon arraignment, waived trial by jury, and stipulated with government counsel that the allegations of Count Three of the indictment were true (R. 169-174). It was also stipulated that all of the telephone calls upon which the Count was predicated, were made from Houston to Las Vegas (R. 173). Following conviction upon the stipulated record (R. 174), defendants unsuccessfully moved in arrest of judgment, on the ground that the conduct alleged did not constitute an offense against the United States because § 1084 could not be applied to wagers and wagering information transmitted into Nevada without infringing upon the powers reserved by the Tenth Amendment to the States (R. 177-179).

QUESTION PRESENTED

Whether the federal government, in the guise of using the commerce power to assist the States in enforcing their antigambling laws, may apply 18 U.S.C. § 1084 to defeat the gambling policies of Nevada while not aiding the enforcement of the laws of any other State.

STATUTE INVOLVED

18 U.S.C. § 1084(a), (b):

> *"Transmission of wagering information; penalties*
>
> (a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined not more than $10,000 or imprisoned not more than two years, or both.
>
> (b) Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State where betting on that sporting event or contest is legal into a State in which such betting is legal."

REASONS FOR GRANTING THE WRIT

Recent Congresses have passed a series of acts arrogating to the federal government criminal law enforcement powers in areas traditionally reserved to the States. Gambling activities are the primary target of this legislation. This Court has already granted certiorari to reconsider the constitutionality of 26 U.S.C. §§ 4411, 4412 (the wagering tax), the forerunner of such legislation, in *Costello* v. *United States,* No. 41 (1966); and has under consideration a recent statute,

18 U.S.C. § 1953, which also intrudes upon the States' power to regulate gambling, in *United States* v. *Fabrizio*, No. 47 (1966). Petitioner seeks review of a third statute, 18 U.S.C. § 1084, enacted concurrently with § 1953, whose application in this case conflicts with the policy of the State of Nevada.

The regulation of gambling, an area where morals and law intersect, should be the concern of the government closest to the people and is reserved to the State police power by the Tenth Amendment. Nevada's legalization and promotion of many forms of gambling is well known,[3] but in this case its policy is negated by commerce power legislation passed under the rubric of "assisting" the states. Petitioner challenges the statute as applied to make a felony of activity endorsed by Nevada and against neither the laws nor the policy of any other State concerned.

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[3] Examples of recent statements of this policy:

"Nevada's principal industry, we say is tourism. The tourists come for many reasons to the State of Nevada . . . Now it would be less than candid to say a great many people do not come to our State because we have some forms of legal gambling that other states do not have . . . . It is a way of life, a part of our life." Grant Sawyer, Governor of Nevada, on NBC Television "White Paper", September 6, 1966.

"Now gambling is a very established fact in the State of Nevada. We have an entire gambling industry here. We have many people who live on that industry and are associated with it. We have tourists who come here because of it. Certainly if I am elected governor, I am not going to do anything to destroy the gambling industry, because it is an accepted fact here." Edward Marshall, District Attorney, Clark County, Nevada, candidate in the gubernatorial primary, on *ibid.*

United States v. *Fabrizio,* No. 47 (1966) presents a like issue.[4] There chances upon a State-run sweep-

[4] The briefs of the parties in *Fabrizio* do not directly confront the constitutional issue, but appellee has asked this Court to interpret 18 U.S.C. § 1953 so as to avoid "serious adverse ramifications such as federal preemption of state laws; conflict with state gambling laws and policies; heavy administrative burden on the federal enforcement and judicial agencies; and acute jurisdictional uncertainty". Appellee further suggested that if the statute is not narrowly interpreted "such a maximum exercise of federal power in an area of minimal federal concern raises broad constitutional issues. *Cf. United States* v. *Kahriger,* 345 U.S. 34 (1953)." *United States* v. *Fabrizio,* Brief for Appellee, pp. 18-19 and n. 18. The Brief for the State of New Hampshire as *Amicus* discusses constitutional problems involved, pp. 3 and 4. Petitioner Martin sought the agreement of the parties in *Fabrizio* to file an *amicus* brief pursuant to Rule 42(2), Rules of the Supreme Court. Counsel for Fabrizio agreed, but the Solicitor General did not, and a motion for leave to file could not have been entertained prior to the date on which the brief would be due.

Subsequent to the preparation of the manuscript of this petition, oral argument in *Fabrizio* was held on November 7, 1966.

At oral argument, the Chief Justice in a question to appellee's counsel, asked in substance whether out-of-state effects of the State-run New Hampshire sweepstakes were analogous to out-of-state effects of legalized bookmaking in Nevada.

At the conclusion of her argument, counsel for appellee indicated in response to a question from Justice Brennan that she did not believe it necessary for the Court in *Fabrizio* to reach questions analogous to those entailed by Nevada's legalized bookmaking.

This petitioner contends that, whether or not problems arising from the Nevada analogy are reached in *Fabrizio,* they are worthy of determination in their own right, in the instant case. The circumstance that Nevada's gambling enterprises, unlike New Hampshire's sweepstakes, are not State-operated, but produce State revenue indirectly, raises additional considerations.

At oral argument in *Fabrizio,* the Chief Justice further asked appellee's counsel, in substance, whether she contended that the Tenth Amendment barred the government's construction of the statute. In response to this question and a following question by

stakes were purchased in New Hampshire and "acknowledgments" of their purchase carried into New York, a State whose courts and legislature have articulated no strong policy or law against licensed sweepstakes.[5] Nevertheless, Fabrizio was indicted under 18 U.S.C. § 1953, which forbids knowingly carrying or sending in interstate commerce any record or paraphernalia

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Justice Harlan as to whether the issue was one of constitutional power, appellee's counsel indicated that she thought that Congress had the constitutional power to proscribe all gambling. Counsel for New Hampshire, in response to a similar question by Justice Harlan near the beginning of counsel's presentation, indicated that in his view the question of constitutional power would be a serious one. In this respect the present petitioner disagrees with the position of counsel for Fabrizio but agrees with the position of counsel for New Hampshire.

Unlike *Fabrizio,* which could be decided on the ground that the conduct charged is not within the intended coverage of the statute (§ 1953), the instant case requires resolution of the Tenth Amendment issue. Petitioner does not urge that his conduct is outside the terms of the statute (§ 1084).

[5] The New York Court of Appeals recently noted that:

> "The trend in New York State demonstrates an acceptance of licensed gambling transactions as a morally acceptable activity, not objectionable under the prevailing standards of lawful and approved social conduct in a community. Our newspapers quote the odds on horse races, football games, basketball games and print the names of the winners of the Irish Sweepstakes and the New Hampshire Lottery." *Intercontinental Hotel Corp.* v. *Golden,* 15 N.Y. 2d 9, 15, 254 N.Y.S. 2d 527 (1964).

See Brief for Appellee, *United States* v. *Fabrizio,* p. 19, n. 18, and Brief for Amicus, *United States* v. *Fabrizio,* p. 21, for the argument that New York gambling statutes do not cover the activity alleged in that case. New York's policy toward sweepstakes is further illustrated by the fact that the legislature has given preliminary approval to a sweepstakes like New Hampshire's. *United States* v. *Fabrizio,* Brief for Amicus, p. 21.

nalia, to be used in a wagering pool. In an amicus curiae brief in the case, the State of New Hampshire argues that "all essential steps in the act of gambling take place within the State.... Gambling is a form of social activity ordinarily beyond the control of the federal government and subject to control within each State by the respective State governments.... Neither New York nor the federal government has the power to prohibit free travel to New Hampshire by any citizen of the United States for the purpose of engaging in any activity which is lawful in New Hampshire." Brief for Amicus, *United States* v. *Fabrizio,* pp. 3, 4. The statute under which petitioner was indicted, 18 U.S.C. § 1084, likewise prohibits use of interstate commerce facilities for certain gambling transactions. Section 1084 forbids anyone in the business of betting and wagering from knowingly using a wire communication facility for interstate transmission bets and wagers, or information assisting in the placing of bets and wagers. Section 1084 shares a common legislative history with 18 U.S.C. § 1953. Both were "part of a single legislative 'package' " containing "a series of anti-gambling bills sponsored by the Department of Justice." See Brief for the United States, *United States* v. *Fabrizio,* pp. 11-12, 15 and n. 9.

Petitioner stipulated in the district court that he was engaged in the business of betting and wagering in Las Vegas, Nevada, and that he accepted football wagers in Las Vegas from bettors who telephoned from Houston, Texas. The stipulation also included the transmission of "information assisting in the placing of bets and wagers" during such calls. (R. 172.)

Nevada, where the wagers were made,[6] prohibits neither wagering on football games nor the dissemination of information assisting in such wagering. Texas does not bar wagers concluded out of the state, nor does it prohibit receipt or distribution of information assisting in the placing of bets and wagers.[7] Thus, here as in *Fabrizio,* gambling activity endorsed by one State and only incidentally connected with another State, which does not itself prohibit the activity, is transformed into a federal felony punishable by imprisonment and heavy fines. Yet, the constitutional authority for the enactment of § 1084 was the commerce clause, and the bill was justified by Congress as filling a professed need "to assist the various states and the District of Columbia in the enforcement of *their* laws pertaining to gambling, bookmaking and like offenses."

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[6] Wagers are considered to be contracts. *United States* v. *Calamaro,* 354 U.S. 351, 355 (1959):

> "The term 'receiving' a wager is synonymous with 'accepting' a wager, that is, the making of a gambling contract."

A contract is made when and where it is accepted. Acceptance given by telephone is governed by the principles applicable to oral acceptance where the parties are in the presence of each other. Restatement, CONTRACTS, § 65. The place at which a telephone contract should be regarded as made is "the place at which the offeree speaks the words of acceptance into the telephone transmitter". CORBIN, CONTRACTS, § 79 (1952).

[7] Title II, Texas Stat. Ann., Art. 645 provides:

> "No person in this State shall enter into an agreement . . . whereby either one or both shall bet or wager money . . . [upon] a game of baseball or football."

The statute apparently would not apply to wagers not concluded "in this State", nor does it prohibit receipt or distribution of information assisting in the placing of bets and wagers. The penalty prescribed by the statute is a fine of five to one hundred dollars.

See S. Rep. No. 588, 87th Cong., 1st Sess., p. 2; H. Rep. No. 967, 87th Cong., 1st Sess., p. 2 (emphasis supplied). See also S. Rep. No. 589, 87th Cong., 1st Sess., p. 3 (quoting Attorney General's letter containing similar statement respecting bill which became 18 U.S.C. § 1953).

The reason that the legislative history was so carefully designed is clear. This Court has upheld commerce clause legislation affecting matters subject to the State police power when such laws aid the States by making it "impossible for one state to violate the prohibitions of the laws of another through the channels of interstate commerce." *Clark Distilling Co.* v. *Western Md. R. Co.*, 242 U.S. 311, 331 (1917). *Clark Distilling* is central in the cases dealing with the importation and sale of liquor within the various states.[8] These cases, like the cases prohibiting the transportation of lottery tickets in interstate commerce, turn on the theory that federal legislation was necessary to prevent one state from preying on another through the facilities of interstate commerce. (See Brief for United States, *United States* v. *Fabrizio*, p. 10). But the federal anti-gambling statutes in *Martin* and *Fabrizio* pervert this rationale for exercise of the commerce power. The States supposedly "preyed upon",

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[8] In *Leisy* v. *Hardin*, 135 U.S. 100 (1890), this Court held that liquor was an ordinary item of commerce and that the states had no power to seize it or otherwise interfere with the conditions under which it was sold. In response, Congress passed the Wilson Act providing that liquor which entered a state through interstate commerce would be "subject to the operation and effect of the laws of such state . . . enacted in the exercise of its police power". This Court in turn upheld the Wilson Act as a valid exercise of the commerce power to assist the states because one basis of the power was the need to assure to each State "protection from encroachment." *In Re Rahrer*, 140 U.S. 545, 561 (1891).

Texas and New York, had a marginal interest in the activity charged, laws which at most only arguably covered it,[9] and if they considered their laws violated, the opportunity to prosecute, which they did not choose to exercise.

The commerce power was not invoked in 18 U.S.C. § 1084 and § 1953, for the purpose of economic regulation but specifically to aid the States in enforcing their laws. In this circumstance, application of the federal statute to supersede the policy of one State without assisting the law enforcement of any other State is of doubtful constitutionality. Suppose that Congress instead of limiting this statute to gambling on athletic contests had also determined that "selling short" on the stock exchange is a form of gambling which should, in order to assist the States in its suppression, be denied the use of interstate wire communication facilities. Petitioner contends that the resultant statute could not constitutionally be applied to an order to sell short telephoned from New Jersey to New York if both States condoned the practice.

In submitting the anti-gambling statutes to Congress, the Attorney General cited problems for law enforcement which only federal legislation could adequately solve. He spoke of professional criminals who use interstate commerce to thwart state policy: "These people can conduct their business by telephone. When local authorities get close to them, they merely pick up stakes and move to another jurisdiction." Hearings before the House Committee on the Judiciary, 87th Cong., 1st Sess., 1961, p. 22. This concern, legitimate though it may have been, resulted in legislation which now allows the federal government to thwart State

[9] See notes 6, 7, *supra*.

policy. Repeatedly during testimony by the legislation's proponents the feeling arose that the federal government must step in and clean up States which were not dealing with gambling satisfactorily to the Department of Justice.[10] See, *e.g.*, testimony of Assistant Attorney General Miller, Senate Hearings before the Committee on the Judiciary, 87th Cong., 1st Sess., 1961, pp. 109-10.

The motivation behind passage of this legislation was "anti-gambling", but there is simply a constitutional barrier against federal regulation of state gambling policy. *United States* v. *Kahriger*, 345 U.S. 22 (1953). In *Kahriger* a federal tax requiring the registration of people in the gambling business was upheld because the Court found a legitimate revenue-collecting aim and result. But had the majority agreed with

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[10] The Nevada Gaming Commission recently issued a report bringing to the surface the federal-state clash over the regulation of gambling. The Gaming Commission recounted a history of intervention by various federal agencies, including the Federal Bureau of Investigation and the Justice Department, concluding that:

> "In late 1961 or early 1962, at times and places unknown to this Commission, the Federal Bureau of Investigation, in the furtherance of its efforts to substantiate preconceived conclusions reached in Washington, began, in violation of the law of Nevada, a morally reprehensible program of domestic espionage upon the citizens of this State. This was carried out, through the surreptitious placement of electronic listening devices in the homes and offices of an unknown number of Nevada residents, including but not limited to various casino executives." Report of the Nevada Gaming Commission, issued September 1, 1966.

The concern and interest of New Hampshire that federal enactments not interfere with its policies is apparent in its appearance as *amicus* in the *Fabrizio* case. As other states adopt varying policies respecting gambling, the federal-state conflict, of which the Nevada Gaming Commission report is an example, will become more aggravated, unless the line is delineated between a valid exercise of the police power and the commerce power as applied to gambling.

Justices Frankfurter and Douglas that the major purpose of the tax was "to grapple directly with gambling in the states," 345 U.S. at 40, the measure would clearly have been struck down. Justice Jackson, concurring with the majority, nevertheless noted that gambling is a local concern and "professional gambling continues to survive because a large and influential part of our population patronizes and protects it." 345 U. S. at 35. This Court has granted certiorari in *Costello* v. *United States,* No. 41 (1966), to reconsider the majority opinion in *Kahriger* and, in so doing, may look once more at the propriety of federal enactments aimed essentially at intrastate gambling.

The constitutional argument here was also present in *United States* v. *Frankfort Distilleries, Inc.,* 324 U.S. 292 (1945). In that case a Sherman Act conviction of producers and distributors who controlled liquor prices in Colorado was reversed by the Tenth Circuit because all the sales were within Colorado, and there was no basis for invocation of the federal act. Reversing the court of appeals, this Court held that the means used to control prices reached beyond the boundaries of Colorado, and that the scheme was dependent for its success upon activity affecting commerce. The argument was raised, however, that the charged combinations were condoned by Colorado's fair trade laws. This Court specifically found that Colorado did not approve the activity and that this therefore was not a case in which the commerce power "is applied to defeat the policy of the state." "That," said the Court, "would raise questions of moment which need not be decided until they are presented." 324 U.S. at 299. The constitutional validity of using the commerce power to defeat, rather than to assist, State policy lies at the heart of the instant case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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